COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PEPPERCORN VILLAGE REALTY TRUST

v.

HOPKINTON BOARD OF APPEALS

No. 02-02

DECISION

January 26, 2004

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HOUSING APPEALS COMMITTEE

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DECISION

The central issue in this case involves a problem that is increasingly common in Eastern Massachusetts—that of limited water supply. We conclude that although there is a water shortage in Hopkinton, the town must supply municipal water to an affordable housing development on the same terms it supplies water to other users.

I. PROCEDURAL HISTORY

On February 23, 2001, Peppercorn Village Realty Trust submitted an application to the Hopkinton Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable elderly housing off School Street in Hopkinton. The housing is to be financed under the Federal Home Loan Bank of Boston's New England Fund (NEF). After due notice and public hearings, by decision filed with the town clerk on January 16, 2002, the Board unanimously granted a permit to build 56 units of

housing subject to a number of conditions. The most significant of the conditions was that water for domestic use be provided on the site, rather than from the municipal water supply, as proposed by the developer. Alleging that this condition and others rendered the proposal uneconomic and represented treatment unequal to that afforded to undsubsidized housing, the developer appealed to the Housing Appeals Committee.

The Committee conducted a site visit, held a six-day, de novo hearing, with witnesses sworn, full rights of cross examination, and a verbatim transcript. Following the presentation of evidence, counsel submitted post-hearing briefs.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the developer must be a limited dividend organization, and it must control the site.[1] 760 CMR 31.01(1). In granting the permit, the Board has acknowledged that the developer has met these requirements. Also see Exh. 2, pp. 5-6; Exh. 1, unnumbered page following p. 9 (Norwood Cooperative Bank Project Eligibility Letter of February 21, 2001); Exh. 1, p. 5; Exh. 27; Exh. 34, sec. g.

B. Motion to Intervene

The owners of Amato Farm, which abuts the proposed development site, moved to intervene in the proceedings before the Committee. No ruling on their motion was made during the hearing, but they were granted the status of amici curiae, and through counsel were permitted to participate fully in the hearing, examining witnesses, presenting argument, and

1. Neither has the Board asserted that Hopkinton has met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock is subsidized housing; see 760 CMR 31.04). Also see Exh. 2, p.4.

submitting a brief. The evidence received during the hearing shows, however, that they may be substantially and specifically affected by the outcome of this case. See 760 CMR 30.04(2). Specifically, the decision as to whether to supply water to the proposed development from the municipal water supply or from on-site wells will substantially affect their farming practices, namely, practices with regard to the application of pesticides. Therefore, their motion to intervene is granted.

II. FACTUAL BACKGROUND

Peppercorn Village Realty Trust initially proposed to build 64 condominium units for residents aged 55 or older on a 27.7-acre parcel of land on School Street in Hopkinton. Exh. 1. During the local hearing, the proposal was reduced to 56 units in three-unit buildings. The site is in an agricultural zoning district, and has 685 feet of frontage on School Street, which is a rural road. Exh. 2, p. 9. Across School Street, the zoning is for single-family homes on 60,000-square-foot lots. Tr. I, 55. Abutting the site to the north is Pinecrest Village, a 64-unit low or moderate income housing condominium development built a little more than ten years ago. Exh. 2, p. 9; Tr. I, 53-54; VI, 126. To the south and east is the Amato Farm, a 140-acre farm on which fruits and vegetables are grown. Exh. 2, p. 9, Tr. V, 7-8.

The town of Hopkinton's municipal water supply is strained. The town is served by five wells, pumping at 65% capacity. Stip., ¶ 1.[2] They operate under a state-imposed withdrawal limit of 940,000 gallons per day (gpd), which was imposed in 2001 and extends until August 31, 2006. Stip., ¶ 2, 11. In 2001, Hopkinton withdrew approximately 865,000 gpd. Stip., ¶ 3. And in that year, it approved domestic water connections to 20 newly-

2. Stipulation of the parties (filed May 21, 2002).

constructed single-family homes. Hopkinton expects 25 to 40 additional new single-family homes to be built and connected to town water (if available), each using 440 gpd. Stip., ¶ 8. Stip., p¶ 5. Additional new users with total use of about 88,000 gpd are expected to be connected to the system. Stip. ¶ 3.

The Town of Ashland is currently building a water treatment plant to serve Ashland and Hopkinton, and water was expected to be received by Hopkinton in the summer of 2002. Stip., ¶ 9. Under an agreement between the towns, Hopkinton is entitled to draw an average of 500,000 gpd to a maximum of 1,000,000 gallons on any given day. Stip., ¶ 9. Hopkinton expects to use this new water source to rest, repair, or replace existing wells that have been operating at excessive levels. Stip., ¶ 9.

A municipal water main in School Street ends at the corner of the proposed development site, within a few feet of the site. Stip., ¶ 6; Exh. 22. The development will use 8,400 gpd. Stip., ¶ 11.

III. ECONOMIC EFFECT OF THE CONDITIONS

In every case, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. 760 CMR 31.05. In a case in which the Board has granted a comprehensive permit with conditions, however, the Appellant most commonly takes advantage of the shifting burden of proof under the Committee's regulations. That is, the developer may prove that the conditions in aggregate make construction and operation of the housing "uneconomic." See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, it must prove that "the conditions imposed... make it impossible to proceed... and still realize a reasonable return as

defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); also see G.L. c. 40B, § 20. If the developer meets this burden, the burden then shifts to the Board to prove "first that there is a valid health, safety, environmental, design, open space, or other local concern which supports the conditions, and then that such concern outweighs the regional housing need." 760 CMR 31.06(7). If the condition is based upon inadequacy of existing municipal services and it is technically feasible to provide the services, then the burden upon the Board is still higher, namely to introduce "evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly." 760 CMR 31.06(8).[3]

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3. We have always held that a comprehensive permit may not be denied due to inadequacy of municipal services. *Milhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee Jul. 8, 1975). This is based upon not only the Comprehensive Permit Law itself, but also the general principle that the services such as water service are public utilities that must be provided by towns on an equal basis. See *Loring v. Commissioners of Boston*, 264 Mass. 460, 464, 163 N.E. 82, 84 (1928); *B&B Amusement Enterprises, Inc. v. City of Boston*, 297 Mass. 307, 308, 8 N.E.2d 788, 789 (1937); *Daley Construction, Inc. v. Planning Board of Randolph*, 340 Mass. 149, 156, 163 N.E.2d 27, 31 (1959); *Baker v. Planning Board of Framingham*, 353 Mass. 141, 144-145, 228 N.E.2d 831, 833 (1967); *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-01 (Mass. Housing Appeals Committee Apr. 10, 2002). The only exception to our rule is found in 760 CMR 31.06(8), which provides that if the Board's decision is "based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services... is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly." If the Board had denied the comprehensive permit in this case, its failure in this case to introduce evidence to meet this heavy burden would be sufficient to justify our ordering it to grant the permit and provide water service. But since the permit was granted, before this burden will be placed upon the Board, the developer must first prove that the condition requiring that the service be provided privately renders the project uneconomic.

A. The Developer has Not Proven that the Condition Requiring a Single-Source Water Supply or Other Conditions Make Building or Operation of the Housing Uneconomic.

Three possible ways in which water for domestic use could be supplied to the proposed housing have been considered. The development could be connected to the existing municipal water system. Individual wells could be drilled for each condominium unit. Or, a single well could be drilled for the development, creating a small public water system. The developer originally proposed connection to the municipal system, but was willing to consider individual wells. Exh. 1, p. 6; Tr. I, 77-78. The Board, however, in Condition 36 of its decision required the new, single-well, public water system. Exh. 2, p. 31 (Condition 36). During the *de novo* hearing before this Committee, the developer placed before us its original proposal for connection to the municipal water supply. It is only this proposal and the Board's alternative of a single well that we will consider. The multiple-well approach presents many significant obstacles, which is why it is not favored by the developer and why the Board has explicitly rejected the idea.[4] Exh. 2, pp. 30-31 (Condition 36); also see Board's Brief, p. 49 (filed Feb. 19, 2003); see, e.g., Tr. II, 137; IV, 46; V, 52, 56; VI, 34, 118.

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4. It is also probably true that if the housing development itself were completely redesigned, the units could be clustered in a way that would preserve the number of units but allow space for a single, open, undeveloped well protection area (Zone I) around it. This would address not only the water issue, but also some of the Board's concerns about open space (see below). But on the other hand, it might raise fire safety and many other issues. It is because of these difficult-to-analyze ramifications, the unintended consequences of any major redesign, that we will not consider it. As under most land use permitting procedures, under Chapter 40B the developer has a right to put a particular proposal before the Board or this Committee for approval or denial rather than for redesign. *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 17 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002)(2002 WL 731689); *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee June 25, 1992).

As the Board concedes, a single-well system must comply with Department of Environmental Protection (DEP) Drinking Water Regulations and Guidelines and Policies for Public Water Systems. Exh. 2, p. 31 (Condition 36); also see 310 CMR 22.02 (definition of "public water system"), 310 CMR 22.21(a). The regulations require that the proponent determine a Zone I protective area around the well, that the zone be owned or controlled by the supplier of the water, and current and future land uses within the Zone I are limited to those directly related to the provision of public drinking water or will have no significant adverse impact on water quality." 310 CMR 22.21(b); also see 310 CMR 22.02 (definition of "public water system").

The developer argues that the Zone I would require elimination of some of the proposed units from the plans, making the entire proposal uneconomic. Specifically, based upon the daily pumping rate of the single well that would be necessary to supply water to the development, the Zone I would be a circle with a radius of 238.6 feet. Tr. I, 90. Under DEP regulations and guidelines, no structures or pavement could be placed in this area. Tr. I, 88. Wherever the well might be placed on the development site, the Zone I would extend across about two thirds of the width of the site. Exh. 26; Tr. I, 87-88. Since housing units are spread throughout the site, this would require elimination of a number of units from the current design. (The developer's site engineer testified that "a minimum of 12 to 14 units" would be lost. Tr. III, 23; also see Tr. I, 92. He had not thoroughly analyzed options for reconfiguring the site, however. Tr. II, 145-146; III, 25. Nevertheless, he believed that if the site were substantially redesigned, fewer units could be eliminated. Tr. III, 24.)

Even if we assume that the condition requiring a single-well water supply will result in the loss of a minimum of 12 to 14 units, however, the developer did not sustain its burden

of proving that the condition makes the project uneconomic. There was no testimony to establish the exact financial implications of the loss of units; the project may still be profitable at 42 or 44 units.

The developer also alleged that several other conditions (see below) have negative economic effects. Similarly, however, it did not introduce evidence to quantify those effects. For instance, there was testimony from the developer's expert that the sewage disposal technology required by the Board would cost between $600,00 and $1,200,000, and a response from the Board's engineer that an alternative technology would cost only $180,000. Tr. I, 114; II, 123; VI, 61. But the exact relationship of these costs to overall project finances was not made clear.

B. The Developer has Not Proven that it is Impossible to Comply with the Condition Requiring a Single-Source Water Supply.

The developer also appears to argue that it is legally and factually impossible to provide a single-well water supply. If that were proven, we would consider the condition uneconomic per se, and require the Board to justify it. If the Board established a legitimate local concern outweighing the regional housing need, we would then consider whether there was any alternative means of protecting the local concern. 760 CMR 31.06(7), 31.06(9).

In this regard, the developer correctly points out that, in addition to the Zone I, DEP is likely to recognize a larger, 750-foot-radius Zone II Interim Wellhead Protection Area. Such an area would extend well beyond the boundaries of the site to both the north and the south, specifically, onto the Amato Farm. Exh. 26. The Department of Food and Agriculture has identified pesticides and herbicides that constitute a threat to groundwater, and regulates their use in 333 CMR 12.00. It seems likely that DEP would determine that use of these chemicals

would constitute a threat to water quality and therefore require delineation of a Zone II. 310 CMR 22.21(1)(b), 22.21(1)(i); Tr. I, 93. The Zone II need not be owned or controlled by the water supplier, but it is also subject to use restrictions, though less onerous than in the Zone I. Clearly, certain pesticides and herbicides commonly used on the neighboring Amato Farm should not be used in a Zone II, and certainly not without an Integrated Pest Management program. Tr. V, 10-12, 46; see 333 CMR 12.03(1). From the evidence presented during the hearing, it is unclear whether DEP would decline to approve a well where there is chemical use in the Zone II, whether the farm would be required to stop using certain chemicals and growing certain crops, or whether monitoring of water quality would be sufficient.[5]

Though it is clear that use of a single-well water supply would be very problematic, the developer has not met its burden of proving that it is impossible to provide such a source.

IV. UNEQUAL TREATMENT

The developer's failure to meet its burden on the question of economics, however, does not dispose of the water supply issue or other issues raised by the conditions imposed. The developer is also entitled to take advantage of the provision in the law and our regulations require local rules to be applied equally to subsidized housing and unsubsidized housing.

5. None of the parties have argued that the Amatos should change their farming methods or stop farming.

A. Municipal Water Supply

Like most towns, Hopkinton normally makes water available to new residences that are constructed on land that abuts a water main. It does not provide water to new residences not on a water main. Although technically it is a simple matter to provide a connection to an existing water main in School Street, which ends at the corner of the site, the Board maintains that no such connection should be allowed.[6] See Exh. 22. The developer interprets this position on the part of the Board as a definitive determination "that under no circumstances [should] Peppercorn Village ever receive municipal water," and argues that instead, it should be permitted to connect immediately to the municipal water system—since anything less would represent unequal treatment as compared to unsubsidized housing. See Appellant's Brief, p. 14.

We should note at the outset that in support of its position, the Board has frequently simply referred to the rules of the Hopkinton Water Department. It points to provisions that prohibit all extensions of water mains, even those of just a few feet, and that permit no more than one house per lot to tie into the municipal system. Exh. 2, p. 29 (Condition 35); Exh. 23, pp. 36-37 (§ 13); Tr. III, 83. Simply referring to these rules, however, gains the Board nothing, since they are exactly the sort of local restrictions that the Comprehensive Permit Law was enacted to address. There can be no question that under the proper circumstances, the Board or this Committee can override the water department rules. *Board of Appeals of Maynard v. Housing Appeals Committee*, 370 Mass. 64, 68-69, 345 N.E.2d 382, 385-386 (1976).

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6. The prohibition extends only to connection for use of water for domestic purposes; a connection to provide water for firefighting using hydrants located on the site will be permitted. Exh. 2, p. 29 (Condition 35).

The Comprehensive Permit Law provides that "[local] requirements... shall be consistent with local needs... if [they] are applied as equally as possible to both subsidized and unsubsidized housing." G.L.c.40B, § 20. "In the case of either a denial or an approval with conditions, the applicant may prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 31.06(4) This requirement of equal treatment is consistent with precedents that municipal services are generally to be provided to all consumers on an equal basis. See *Rounds v. Board of Water and Sewer Commissioners of Wilmington*, 347 Mass. 40, 44, 196 N.E.2d 209, 212-214 (194); *Clark v. Board of Water & Sewer Commissioners of Norwood*, 353 Mass. 708, 710-711, 234 N.E.2d 893, 895 (1968).

An analysis of what constitutes equal or unequal treatment, however, is complicated. The developer relies partly on the Hopkinton Master Plan, which lists as one of its goals as to "provide sewer and water to the industrially zoned areas of Lumber Street, South Street, and Elmwood Park."[7] Exh. 25, p. 38 (Goal 7(a)). But this argument fails since under the Comprehensive Permit Law and our regulations, subsidized housing must receive equal treatment as compared to unsubsidized housing, not industrial or commercial uses. G.L.c.40B, § 20; 760 CMR 31.06(4).

The developer also relies on testimony that 40 units of housing in the Sanctuary Lane housing development were recently given access to municipal water. Tr. VI, 129. In that case there was a water main abutting the property so that no extension was required. But the Water Department rule that only one house per lot be connected to town water would have

7. There was contradictory testimony from the Hopkinton water and sewer manager, who had served in that capacity for two and a half years. When asked if the town policy was to extend water mains to encourage industrial development, he testified, "Not since I've been in charge of it." Tr. II, 86.

prevented a connection, and the Board overrode the requirement. Tr. VI, 146-147. Once again, however, the developer's comparison is inapposite. It is not a comparison to unsubsidized housing. Sanctuary Lane is subsidized housing built under the Comprehensive Permit Law. Not only does this not meet the technical requirement of the statute and regulations, but in addition, we believe that as a matter of policy a board of appeals should not be bound to waive a local requirement for all comprehensive permit applications simply because it has chosen to waive it in one particular situation.

Far more compelling is the developer's argument that town water has been made available to single-family homes after the time that the developer applied for a comprehensive permit (in February 2001). That is, 20 newly constructed homes were provided with water in 2001, and provision of water to a total of 25 to 40 such homes was anticipated roughly through the end of 2002. Stip., ¶¶ 5, 3(4). But we are reluctant to draw the conclusion that the developer would have us draw—that this proves that there is no water shortage and Peppercorn Village should immediately be allowed to connect to the water system. Rather, the circumstances presented here call for a more nuanced approach.

It appears very likely from the evidence that the water shortage in Hopkinton is significant enough that the town should both take action to improve the situation and consider limiting or even prohibiting all new connections in the meantime.[8] See, e.g., Tr. III, 75, 115-117, 127-129; IV, 49; VI, 127; Exh. 25, p.69; Stip., ¶¶ 1-11. We will not speculate as to whether the water system was on the verge of a crisis as this case developed or whether

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8. If this is in fact true, both residential and commercial water connections should be prohibited, particularly since commercial establishments typically use large amounts of water. See, e.g., Stip., ¶ 5, 3. Conversely, if the town were prepared to permit commercial connections, then the water shortage could not be severe.

it was because a rather large affordable housing development was proposed that town officials finally recognized a crisis. But in either case, if the shortage is as severe as it appears, then under the equal treatment provisions of the Comprehensive Permit Law the town should certainly not be allowed to permit connections by single-family homes, while at the same time using the shortage to justify not permitting subsidized housing developments.

The most appropriate step for the town to take would be to impose a temporary water connection moratorium under its broad power to act for the protection of the public health, safety, or welfare.[9] See *Hamel v. Board of Health of Edgartown*, 40 Mass. App. Ct. 420, 664 N.E.2d 1199 (1996); *Sturges v. Town of Chilmark*, 380 Mass. 246, 252-260, 402 N.E.2d 1346, 1350-1355 (1980); *Collura v. Town of Arlington*, 367 Mass. 881, 885???, 329 N.E.2d 733, 736?? (1975). This would give it time to plan and implement solutions to the water shortage in a way that would be fair to all.

This Committee does not have the power to require the town to impose a moratorium. But it does have the power to require connections for the affordable housing development to be approved. Therefore, we will order this development be placed on a waiting list for receipt of town water, and if and when other residential or commercial users are permitted to connect to the municipal system, this development must be permitted to connect.[10] We

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9. Local officials' authority to act to protect the town water supply is contained in various statutory provisions, including G.L. c. 40, §§ 39A, 41A, 42 and c. 41 § 69B. In addition, the town may petition the Department of Environmental Protection for a declaration of a state of water emergency pursuant to the Mass. Water Management Act, G.L. c. 21G, §§ 15-17. Moratoriums on issuance of water withdrawal permits are specifically provided for in G.L. c. 21G, § 17(5). Such moratoriums, since ordered by a state department, presumably cannot be overridden by the Comprehensive Permit Law.

10. Since the law allows "a single application to build... housing in lieu of separate applications to the applicable local boards," this development's position on the waiting list should be determined by the date of its application to the Board for a comprehensive permit. G.L. c. 40B, § 21.

expect that, because of the water shortage, rather than connect the 64 units of affordable housing, the town will, formally or informally impose a moratorium on all residential and commercial connections.[11] It is then likely to continue to investigate new sources of water, and when they are obtained, provide water to the Peppercorn Village pursuant to the waiting list. If we are wrong in our assessment of the water shortage, and the town continues to allow water connections, then the affordable housing development will move forward promptly, as it should under the equal treatment provision of Chapter 40B. In either case, Peppercorn Village will take its appropriate place on the list with all other development proposals in Hopkinton.

B. Open Space

Condition 15 of the Board's decision requires that 30% of the site (i.e., 8.3 acres of the entire 27.7-acre site) be preserved in perpetuity as open space in its natural state. This requirement is based upon a Hopkinton bylaw that applies to senior housing developments. Exh. 29, §§ 210-105.1B(5), 210-105.3B(18).

The development proposal includes an extensive vegetated buffer inside the perimeter of the site. It is typically 80 feet wide or more. Exh. 3, sheet 2; Tr. III, 30; VI, 140. This area, together with two large oval areas in the center of the site formed by loops in the project's roadway, was referred to on plans and in the hearing as the "non-irrigated area."

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11. In effect, our ruling here is quite similar to the conclusion we would have reached on the same facts if the Board's decision had been based on an existing moratorium. *Franklin Commons v. Franklin*, No. 00-09, slip op. at 13-16 (Mass. Housing Appeals Committee Sep. 27, 2001) is an example of our approach to moratoriums. There, we found that localized sewer capacity problems, particularly when apparently insufficient to justify a sewer moratorium, were not grounds for denial of a comprehensive permit. Here, unlike the *Franklin Commons* case, we have found sufficient factual support for a reasonable town-imposed moratorium. Looked at another way, our decision today stands for the proposition that if the only issue raised by a Board is a townwide water shortage,

The non-irrigated area includes naturally wooded areas, constructed stormwater detention areas, and a large septic leaching area, and comprises 14.9 acres or more than 50% of the site. Tr. I, 124, 128. The developer's expert did not know the size of the wooded area, that is, the entire area excluding the detention ponds and leaching field. Tr. I, 129; III, 43.

There was no showing that the open space requirement was applied unequally to this development in comparison to non-subsidized housing. We therefore uphold it.

Two of the Board's experts testified that they believed more open space could be created through design changes, and we believe that even excluding the non-contiguous inner ovals, the 8.3-acre requirement can be met by making slight modifications to the broad buffer at the perimeter of the site. One serious impediment, the need to cut trees and disturb land to drill wells, has been eliminated since we have ruled that public water is to be provided. And by moving buffer boundary slightly closer to buildings or even making minor modifications in building locations, additional space, if necessary, can be gained.[12] If compliance with this condition can be accomplished in no other way, then the developer can remove several of the housing units to preserve more open space.

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then that shortage cannot justify the denial or conditioning of a comprehensive permit unless the town has imposed or is willing to impose a townwide moratorium on water connections.

12. There is some ambiguity as to whether the buffer area qualifies as contiguous open space under the bylaw. The bylaw requires only that the open space "*generally* occur as a single contiguous area." Exh. 29, § 210-105.3B(18)(emphasis added). A narrow, 15-foot-wide buffer required under another section of the zoning bylaw probably would not qualify. See Tr. III, 30. It is likely that Hopkinton would normally interpret its bylaw to require the open space here to be both fully contiguous and non-circumferential. But since Chapter 40B permits such local concerns to be weighed against the regional need for housing, if the requisite open space can only be provided around the perimeter or in a way that is not completely contiguous, that would be a small accomodation to permit the affordable housing to be built. In any case, we find that the broad buffer proposed here satisfies the bylaw requirement. The buffer need not be uniformly wide, but the septic leaching field and stormwater detention basins should be reconfigured sufficiently to make it as wide as possible at the rear of the site. The additional bylaw requirement that significant natural features

The developer should prepare carefully drawn plans distinguishing between areas disturbed during construction of detention areas, leaching fields, and other infrastructure and the non-disturbed buffer area, in which there will be no cutting of trees or construction of any infrastructure, including underground pipes. This area must comprise 8.3 acres and be preserved in perpetuity.

V. MISCELLANEOUS CONDITIONS

As noted above, the developer did not establish that the conditions imposed by the Board make construction of its proposal uneconomic. As a result, our review of those conditions is limited to two sorts of analysis. First, we may review conditions if the developer has introduced evidence that they involve local requirements that have not been applied equally to affordable housing and non-subsidized housing. It is under this alternate statutory standard that we considered the conditions concerning water supply and open space, above.

Second, we may engage in a much more limited review of conditions to ensure that they have some bona fide basis. That is, while the Comprehensive Permit Law specifically instructs us to order the "board to modify or remove any... condition [that makes the proposal uneconomic]," it provides no similar guidance for situations such as we have here, where the conditions do not render the proposal uneconomic. G.L. c. 40B, § 23; also see 760 CMR 31.08(1). Certainly, the overall legislative intent of the statute is to minimize state intrusion into local prerogatives, and any bona fide condition should be upheld. See

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be preserved is easily met since the evidence shows that there are none on the site other than the overall wooded landscape. See Tr. IV, 45, 84.

Cooperative Alliance of Massachusetts v. Taunton Zoning Board of Appeals, No. 90-05, slip op. at 8, n.12 (Mass. Housing Appeals Committee Apr. 2, 1992). But, as we noted in *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 20 (Mass. Housing Appeals Committee, June 11, 2003), the principle of deference to local prerogatives "should not be invoked to permit the local Board to act unreasonably. Even with regard to special permits issued under the Zoning Act (G.L. c. 40A, § 9), where the local board is given far more deference than under Chapter 40B, it "must act fairly and reasonably...." *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638, 255 N.E.2d 347 (1970); also see *Building Comm'r of Franklin v. Dispatch Communications of New England, Inc.*, 45 Mass.App.Ct. 709, 725 N.E.2d 1059 (2000), rev. den. 431 Mass. 1104, 733 N.E.2d 125 (2000). Thus, special permit conditions "founded [only] on broad considerations of the general public welfare" are beyond the authority of the local board. *Middlesex & Boston St. Railway Co. v. Board of Aldermen of Newton*, 371 Mass. 849, 857-858, 359 N.E.2d 1279 (1977)." Thus, in making its decision and imposing conditions, the Board must focus on legitimate health, safety, and environmental concerns expressed in G.L. c. 40B, § 23and 760 CMR 31.06(2). (6), and (7). "Conditions unrelated to the concerns cognizable under c. 40B, unreasonably or arbitrarily imposed, or based on legally untenable grounds should not be allowed to stand." *Archstone Communities Trust v. Woburn, supra*, slip op. at 20-21. Also see *MacGibbon v. Board of Appeals of Duxbury, supra* at 639 ("The decision [denying a special permit] cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary."). We will defer to the local board in questionable cases, but, particularly when the board has not articulated a reasonable factual or legal justification for a condition, we will modify or eliminate it.

A. Subdivision Standards for Roadways (Conditions 2(i) & 14)

The Board explicitly waived two aspects of the Hopkinton Subdivision Rules and Regulations, namely, the requirement that the roadway be designed for possible connection to streets on adjoining properties and the requirement concerning minimum roadway centerline radius and sight distance. Exh. 2, p. 27 (Condition 30). In addition, the parties stipulated that the width of the roadway: it will generally be 25 feet wide, but only 17 feet wide in the one-way segments at the entrance and in the center of the site. Tr. II, 84-85; IV, 148.[13]

The developer has also agreed to use either vertical or sloped granite curbing where necessary to prevent damage from snowplows and to provide granite gutter mouths at all catchbasins. Tr. I, 141-142. The Board's expert civil engineer testified as to the value of granite curbing and also that the Subdivision Rules and Regulations would require such curbing only on approximately 20 to 30 percent of the roadway. Tr. V, 163; also see TR. VI, 68-70. Thus, with regard to curbing, the Board has clearly articulated a justification for the condition imposed that goes well beyond showing a bona fide basis, and we uphold it.

B. Subdivision Standards for Drainage Pipes (Condition 10)

Hopkinton Subdivisions Rules and Regulations require reinforced concrete stormwater drainage pipes. Tr. I, 139. During the hearing, the Board's expert recommended that concrete pipes be used under all roadways, but that plastic pipe be permitted in other

13. There was also testimony concerning the angle at which the northern portion of the development's roadway will intersect with School Street. The Subdivision Rules and Regulations permit an angle of no less than 60 degrees, while the preliminary plans show an angle of 58 degrees. This is a minor point that should be resolved in the final construction plans. See Tr. I, 140-141; II, 80-81; VI, 68-70. In fact, the Board conceded that a 58-degree angle would be acceptable, subject to review of final plans. Board's Brief, pp. 26-27.

locations. Tr. V, 207; also see Tr. VI, 76-78. This condition is also clearly bona fide, and we therefore uphold it, as modified to permit plastic pipe in non-roadway locations.[14]

C. Trees (Conditions 10, 45, 48, & 57)

The Board's legitimate concern about trees on the site was not developed clearly during the hearing. Nevertheless, it was presented with sufficient specificity that under the limited standard of review that applies here, we uphold the conditions, subject to the following clarifications.

First, the subdivision requirement that street trees be planted every 40 feet may be imposed unless the parties agree upon an alternate plan. See Tr. I, 145; also see Tr. VI, 86-8.

Second, the Board's requirement that cutting of trees be kept to a minimum is certainly reasonable, and was not seriously challenged by the developer. Therefore, Conditions 45 and 48 are upheld.

Finally, although the developer submitted reasonably detailed plans concerning tree removal and stone wall alteration along School Street, since the town has designated the street as a scenic road, the Board included greater protections in Condition 57. See Tr. II, 19; Exh. 3, sheet 2; Exh 2, p. 35 (Condition 57). In its brief (at p. 23), the Board has proposed revisions to Condition 57. We uphold the condition as revised. See § VI-2(a), below.

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14. An additional minor point was raised concerning standards for catchbasin placement. The developer was concerned that catchbasins would be required at all "point[s] of curvature and tangency" of the roadway. Tr. I, 142. The Board clearly took a reasonable approach to this issue and it, too, can be resolved when final construction plans are prepared. See Tr. VI, 79-81. Similarly, the Board has agreed to permit sidewalks to provided as shown on the preliminary plans subject to the normal final review of constructions plans by the local official who routinely approves such drawings. Board's Brief, p. 29; also see 760 CMR 31.09(3).

D. Detention Basin Side Slopes (Condition 38)

The Board waived its requirement in Condition 38 that the slopes of the sides of detention basins be no greater than 4 to 1; instead they will be permitted to be 3 to 1 or less. Board's Brief, pp. 6-7.

E. Community Center (Condition 7)

The only disagreement about constructing a community center on site, as required by Condition 7, arises from the need to provide it with a public water supply. The developer has agreed to build the community center if municipal water service is provided to the development, and therefore this question is moot.

F. Sprinklers (Condition 7 & 51)

Two conditions, 7 and 51 require automatic fire suppression systems. The principle piece of evidence regarding this issue is a letter from the Hopkinton Fire Chief, who did not testify. The letter apparently responds to an earlier design, which included eight buildings with four or more dwelling units. It notes that G.L. c. 148, § 26*I requires* sprinklers in the eight large buildings, and then goes on *request* sprinklers in units in the smaller clusters as well. The proposal has since been redesigned so that all of the clusters are three units or smaller. Thus, it is clear that state law does not require sprinklers, and the Board has not drawn our attention to any similar, uniformly applied local requirement. We therefore eliminate the sprinkler requirement as one unreasonably imposed with no legal justification.

G. Sewage Disposal (Condition 33)

Condition 33 requires that the development's sewage disposal system comply with the State Environmental Code, Title 5 (314 CMR 15.000).[15] Because the Board anticipated that one or more wells would be drilled on the site, it also required compliance with the state's Ground Water Quality Standards (314 CMR 6.00). Inclusion of these requirements in the Board's decision is unnecessary, since any and all housing proposed under the Comprehensive Permit Law must comply with all state laws. Though we leave the final factual and legal judgments with regard to septic disposal in the hands of the appropriate state environmental regulators, we note that it appears that the Ground Water Quality Standards will not be applied to this development. Even the Board's expert civil engineer agreed that compliance issues related to those standards would "vanish" if municipal water was supplied, as we have ordered in this decision. Tr. IV, 37-38.

H. Local Preference (Condition 9)

Condition 9 contains the common provision that preference in the initial sale of units be given to local residents and members of minority groups. The only aspect of the condition that was challenged by the developer—the requirement that this preference be perpetuated by deed restriction—has been waived by the Board. Board's Brief, p. 6.

15. The regulations of the Hopkinton Board of Health simply incorporate all of Title 5. Exh. 13,. P.3; Tr. IV, 14.

I. Subsequent Approvals (Conditions 2, 31, 34,[16] & 57)

In a number of places in its decision, the Board requires the developer to appear in the future—either before itself or other municipal boards—for further review and approval. Such a "condition subsequent" undermines the entire purpose of a single, expeditious comprehensive permit and is improper. *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002); Owens v. Belmont, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 25, 1992); also see 760 CMR 31.09(3).

Some of the Board's conditions, however, merely require submission and approval of additional plans concerning issues that were not addressed in the preliminary plans submitted with the comprehensive permit application. For instance, Condition 55 requires submission of plans concerning stockpiling of earth during construction to ensure compliance with the town's Earth Removal Bylaw. Such requirements, so long as they do not require further hearing and approval by the Board, but rather entail only approval by the town official who customarily reviews such plans, are appropriate.

J. Bonding (Condition 27)

The Board also required that the construction of infrastructure be secured by one of the methods described in G.L. c. 41, § 81U. The parties stipulated that so long as the developer may choose among the statutory options, this condition should remain in effect. Tr. VI, 103-105. We therefore rule that Condition 27 is proper.

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16. One of the more serious issues raised by a condition subsequent is the possibility of sewage breakout into a stormwater detention basin. See Exh. 2, p. 29 (Condition 34). The Board, however, waived this issue by choosing not to brief it. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995).. And, in any case, we are confident that any possible design flaws will be caught in the Title 5 review process. See § V-G, above.

VI. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Hopkinton Board of Appeals, but concludes that certain of the conditions imposed in the Board's decision are requirement that have not been applied as equally as possible to subsidized and unsubsidized housing or are otherwise unsupportable under G.L. c. 40B, §§ 20-23. The Board is directed to issue an amended comprehensive permit for construction of 56 homeownership units as provided in the text of this decision and in the conditions below.

1. The comprehensive permit shall conform to the comprehensive permit filed with the town clerk on January 16, 2002 (Exhibit 2) except as provided in this decision.

2. Comprehensive permit conditions shall be modified or added as follows:

   (a) Scenic Road - Condition 57 shall be modified as follows (see § V-C, above):

   > School Street has been designated a scenic road by the Town. The Applicant must, therefore, designate on the ground by flagging those trees greater than 4 inches in diameter or any stone walls which will be affected by the construction of the Project. The Applicant shall advise the Town Tree Warden after the trees and stone walls have been flagged and the Tree Warden shall either approve the proposal or disapprove the proposal and offer an alternative plan for such removal as will enable the Applicant to complete the Project. In the event any trees over 4 inches in diameter must be removed, the Applicant must plant an equivalent number of trees along School Street or elsewhere on the site as determined by the Tree Warden, to compensate for the lost trees. Any stones which may be required to be removed from stone walls must not be removed froe the site but must be used to enhance other sections of the stone walls on the site. Only those trees and portions of stone walls necessary for construction of the new entrance driveways and to ensure site sight distances should be altered or removed.

3. The Hopkinton Water Department shall immediately place the proposed development on a waiting list for receipt of town water, and if and when other residential or commercial users are permitted to connect to the municipal system, this development shall be permitted to connect. The development's position on the waiting list should be determined by the date of its application to the Board for a comprehensive permit.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take such further steps as may be necessary to formalize the comprehensive permit for recording or other purposes, and to insure that a building

permit is issued to the applicant, without undue delay, upon presentation to the building inspector or building department of construction plans which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

5. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: January 26, 2004

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Frances C. Volkmann

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